Supreme Court, U.S.
FILED
MAR 15 1994
OFFICE OF THE CLERK

No. 93-1307

In The

Supreme Court of the United States

October Term, 1993

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.,

Respondents,

v.

RESOLUTION TRUST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MORGAN, DREISESZUN, GERHART, OZAR, GIFFORD, JONAS, KIENE, NAY, SALAZAR, AND PISTILLI

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QUESTIONS PRESENTED

1. Whether the Resolution Trust Corporation as a third party defendant may remove the entire action to federal court pursuant to 12 U.S.C. § 1441a(*l*).

2. Whether an *ex parte* state court order purporting to sever a third party action from the original action for the express purpose of trying to prevent removal by the Resolution Trust Corporation pursuant to 12 U.S.C. § 1441a(*l*) is inconsistent with the Supremacy Clause.

3. Whether the third party action in this case so lacks any arguable basis in law or fact that it would be a frivolous basis for conferring federal jurisdiction pursuant to 12 U.S.C. § 1441a(*l*).

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System, the plaintiff and appellant below.

Respondents on this brief are Frank S. Morgan (deceased), Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Harry S. Jonas, Ralph Kiene (deceased), Randall M. Nay, Tony Salazar, and Phillip M. Pistilli, all defendants, third party plaintiffs, and appellees below.

Other respondents include: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Michael Russell, Gage & Tucker, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, and Robert Spence, all defendants and appellees below; and the Resolution Trust Corporation, a third party defendant and appellee below.

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Respondents Morgan, Dreiseszun, Gerhart, Ozar, Gifford, Jonas, Kiene, Nay, Salazar, and Pistilli respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 4 F.3d 614 (8th Cir. 1993) and is included in the Appendix to the Petition at pp. 3-18. The order of the court of appeals denying rehearing is included in the Appendix to the Petition at p. 19. The decision of the district court on the motion to remand is unreported and is included in the Appendix to the Petition at pp. 20-21. The *ex parte* severance order of the District Court of Shawnee County, Kansas, entered prior to removal, is unreported and is included in the Appendix to this Brief at pp. 1-2. The brief transcript of the *ex parte* proceedings in the state court, containing the court's reasoning for granting relief, is included in the Appendix to this Brief at pp. 3-5.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1993. Rehearing was denied on October 12, 1993. Petitioner obtained an extension of time to file its Petition until February 9, 1994, and the Petition was filed on February 9, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1292(b), and in the district court upon 12 U.S.C. § 1441a(*l*).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

12 U.S.C. § 1441a(*l*) provides, in pertinent part:

(1) In general

Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

* * *

(3) Removal and remand

(A) In general

The Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

Article VI, clause 2 of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

A. Factual Background

This is an investment fraud case alleging common law fraud, various tort theories, and violations of the Kansas Securities Act in connection with Petitioner the Kansas Public Employees Retirement Systems' ("KPERS") $65 million investment in high yield debt securities issued in 1986 and 1987 by Home Savings Association of Kansas City, Missouri, N.A. ("HSA"), a savings and loan association placed in receivership in March 1991. The Resolution Trust Corporation ("RTC"), a federal agency pursuant to 12 U.S.C. § 1441a(b), was appointed receiver for HSA. The Respondents here (the "HSA defendants") were all members of the HSA board of directors. The other Respondents are KPERS' investment advisors (Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, and others), attorneys (Gage & Tucker), accountants (Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, and Robert Spence), and a former KPERS trustee (Michael Russell).

On October 2, 1992, the HSA defendants filed in state court a third party petition in two counts against the RTC. Count I alleged that HSA had a net worth of at least $22 million as of the date of its seizure and control by the

RTC, which should have been available for distribution to KPERS as the institution's sole priority shareholder, that there was post-seizure negligence of RTC which dissipated that net worth and that, accordingly, pursuant to principles of comparative implied contribution and indemnity under Kansas law, at least $22 million of KPERS' loss was the responsibility of the RTC, not the HSA defendants (if they are liable to KPERS on negligence or strict liability bases, as KPERS claims). Count II alleged that the HSA defendants were entitled to indemnification under a specific federal regulation, 12 C.F.R. § 545.121, applicable to KPERS' claims for defendants' conduct as directors of HSA.

The filing of this third party petition set in motion a bizarre and unbecoming chain of events that culminated in the state court – already with a history of disfavoring any action which could lead to removal by RTC[1] –

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[1] A pivotal legal issue throughout the life of this case has been the question whether KPERS is actually asserting derivative claims of corporate mismanagement, which belong to the institution's successor, RTC. Significantly, KPERS has never alleged that the securities it purchased in 1986 and 1987 were not worth the price paid; the securities were never in default until after the RTC receivership was imposed, and KPERS was timely paid all interest due pre-seizure, nearly $30 million. Thus, the HSA defendants have contended that KPERS has alleged damages only from the government's seizure of HSA in 1991, and not from any of the alleged fraud at the time of investment in 1986. The HSA defendants raised this issue in a motion to dismiss filed in state court before removal and in a pending summary judgment motion filed in the federal district court after removal. The state court denied the motion to dismiss, and attempted in vain to cure KPERS' derivative suit problems by striking certain of the derivative suit allegations

entering an *ex parte* order purporting to sever the third party action from the original case on the pretext of the existence of an emergency. According to representations in court filings (including an affidavit of KPERS' counsel) and in oral argument, as well as a state court transcript, Resp. App. at 3, this *ex parte* procedure was a purposeful effort by KPERS and the state court calculated to obstruct RTC's federal law right to remove the entire action.

On October 8, 1992, at approximately 4:00 p.m., KPERS contacted the state court clerk regarding the filing of a motion to strike or sever the HSA defendants' third party petition. The state court clerk advised that an employee would remain in the office after the normal 5:00 p.m. closing time to permit filing of the pleadings. KPERS also contacted the chambers of the state court judge handling the case to advise that it "desired to present a matter to the court for his *ex parte* consideration, that day." Subsequently, at 5:26 p.m., KPERS appeared before

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from plaintiff's petition. The RTC also had raised the derivative claims issue in a motion to intervene filed in state court, and RTC renewed that motion in federal court after removal. This should have been a routine procedural matter, as the RTC had an absolute right to intervene under Kan. Stat. Ann. § 60-224(a) (the equivalent of Fed. R. Civ. P. 24(a)), but the state court without explanation failed to rule RTC's motion. RTC had candidly informed the court and the parties that once it was permitted to intervene it would remove the case to federal court for the purpose of seeking a ruling on the derivative nature of KPERS' claims. In retrospect, that prospect of removal was apparently why the state court would not rule.

the state court judge "to present [its] Motion and proposed *ex parte* Order."[2] At 5:42 p.m., the state court entered an *ex parte* order severing the third-party action from the original action. The only record of what occurred in the intervening sixteen minutes is a three-page transcript, which indicates that "[t]he Defendants appeared not." Resp. App. at 3.[3] The transcript reflects the following statement by the state court judge:

> [T]here's also been provided to the Court an order requesting that the, that the third party claim alleged, alleged third party claim of the Morgan defendants that I just named against the [RTC] be severed, and I do this on a ex parte basis.

Resp. App. at 4.

This entire chain of events occurred without any notice to any defendant in the case, although many were represented by counsel in the same city (Topeka, Kansas) or within an hour's drive of the court (in Kansas City). In the wake of this *ex parte* procedure, KPERS has admitted that it intended to have the state court consider the matter *ex parte*, notwithstanding the fact that it could easily have given notice of its motion.

The state court explained the basis for its *ex parte* action as follows:

> The Court is familiar with the history of this case, feels that under the circumstances the

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[2] These quotations and other facts in this paragraph are from an affidavit of KPERS' counsel submitted to the district court.

[3] The transcript is included in the Appendix to this Brief.

> addition of the [RTC] in another, by the third party petition would subject this case to removal under the federal statutes and in which case until the motion to dismiss would be argued, testing the substance of that claim the Court would not feel that the, to maintain them in the same case and subjecting this case to removal would be in the best interest of the advancement of the principle case.

Resp. App. at 4-5. As KPERS' counsel conceded at the district court hearing on KPERS' motion to remand, and the state court transcript makes clear, the reason the state court judge entered the *ex parte* severance was to prevent RTC from removing the case.[4]

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[4] The state court's *ex parte* order was entered on the pretext that there was an emergency. The emergency consisted solely of KPERS' desire to do something quickly to prevent RTC from removing the entire case to federal court, a right which it unquestionably had under 12 U.S.C. § 1441a(*l*), as shown by the following colloquy between the federal district court and KPERS' counsel:

> THE COURT: And there was an emergency.
>
> MR. DEACY: It was an emergency.
>
> THE COURT: What was the emergency?
>
> MR. DEACY: The emergency was that so long as the case was one case, the RTC could remove it all.
>
> THE COURT: And they could – had the right under federal law to do so.
>
> MR. DEACY: They had the right under federal law so long as they were a party to the case.
>
> THE COURT: Right. And so the emergency was to do something quickly to attempt to prevent the RTC from removing the case?
>
> MR. DEACY: That's right, Your Honor.

RTC removed the entire action on October 13, 1992, pursuant to 12 U.S.C. § 1441a(*l*), which confers federal court jurisdiction over "any civil action, suit, or proceeding to which the [RTC] is a party." KPERS moved to remand, and the federal district court denied the motion. The Eighth Circuit accepted an interlocutory appeal and affirmed.

B. The District Court and Court of Appeals Decisions

The federal district court decision was entered in a written order, Pet. App. at 20-21, that referred to the reasoning stated by the court on the record at a hearing. At the hearing, the district court indicated that the state court order severing the third party action from the original action – the sole basis for KPERS' remand motion – was void because it violated the Supremacy Clause. As the district court found, "there was no valid excuse for the order that the state court entered because the reason is the very reason prohibited by the Supremacy Clause." The court went on to conclude: "Under these circumstances, the attempt to sever a case into two cases for the sole purpose of defeating a right conferred by Congress on the RTC to remove any case in which it was a party is void because it violates the Supremacy Clause in Article VI, Clause 2 of the United States Constitution."

The court of appeals affirmed in a unanimous decision, finding that "[o]n its face the Kansas court's order violates the Supremacy Clause." Pet. App. at 13. The court noted that "the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove," and found that "Congress gave the

RTC a broad right to remove any action." *Id.* at 12. Accordingly, "once the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC became inextricably involved in the entire action," and the purported severance by the state court did not "exclude the third-party defendant from participation in the original action nor deprive it of its ability to exercise its congressionally conferred right to remove the entire case to federal court." *Id.* at 14-15. The court of appeals also rejected KPERS' fact-based assertions that the third party action was frivolous, finding that the arguments did not merit consideration at length. *Id.* at 17. Rehearing was denied without dissent or comment. Pet. App. at 19.

REASONS FOR DENYING THE WRIT

1. The Petition does not present any issue as to which there is a conflict of decisions or which constitutes an important or substantial question of federal law. The Petition itself does not contend that there is a conflict or an important question at issue. Instead, the Petition raises fact-based issues concerning the third party action and issues that were not reached or decided by the court of appeals or the district court, and contends that the court of appeals ignored its own precedents. These matters are not well-suited for review on a writ of certiorari. The court of appeals' decision on this interlocutory appeal does not merit further review.

2. As to the first question presented by both Petitioner and these Respondents for review, the law is uniform and well-settled that the scope of 12 U.S.C.

§ 1441a(*l*), which is the RTC removal provision, includes the principal action when the RTC is named as a third party defendant. Pet. App. at 11; *California v. Keating*, 986 F.2d 346 (9th Cir. 1993) (addition of RTC as third party defendant transforms entire action into one that arises under federal law and RTC may remove).

In *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992), the court interpreted a similar "special" removal statute, including a provision for removal of "any civil action," which is the same statutory phrase Congress used in 12 U.S.C. § 1441a(*l*). The court found:

> The use of the words "civil action" are synonymous with the concept of an entire case when those words are not otherwise limited by accompanying language, a companion statute, or legislative history. As the rules of federal practice make clear, a civil action is an entire civil case, encompassing claims filed by plaintiffs and claims filed by third-party plaintiffs.

974 F.2d at 1260 (citation omitted); *see also Nolan v. The Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991). The court of appeals noted that KPERS did not disagree with this analysis on the interlocutory appeal. Pet. App. at 11. Accordingly, issuance of a writ of certiorari on the first question would be inappropriate because there is no conflict of decisions or important issue and the question was not placed in issue below.

3. As to the second question presented by both Petitioner and these Respondents for review, Petitioner does not challenge the court of appeals' core holding that a state court decision entered solely to obstruct a federal statutory right to remove an action is unconstitutional

under the Supremacy Clause. The Supremacy Clause makes the Constitution and laws passed pursuant to it "the Supreme Law of the Land," U.S. Const., art. VI, cl. 2, and "charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). Moreover, "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 371.

The court of appeals found that it is "well established that states cannot directly or indirectly prevent, defeat, or limit the free exercise of the right to remove." Pet. App. at 12 (citing *Goldey v. Morning News*, 156 U.S. 518, 523 (1895)). As the district court found, the state court's *ex parte* severance order, entered "for the sole purpose of defeating a right conferred by Congress on the RTC to remove any case to which it was a party," was inconsistent with the Supremacy Clause. These central holdings of the courts below are not the subject of any conflict of decisions; although Petitioner seeks review of the court of appeals' ultimate decision under the Supremacy Clause, it does not challenge the reasoning or authority for the decision. Instead, the Petition raises issues concerning the uniformity of Eighth Circuit law, issues not addressed by the court of appeals, and issues not raised in the court of appeals.

4. a. The third question presented by these Respondents concerns the subject addressed at the greatest length in the Petition. The district court, citing *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 219 & n.7 (8th Cir. 1990), *vacated on other grounds*, 943 F.2d 860 (8th Cir. 1991),

found that the third party action against RTC could serve as a basis for conferring federal jurisdiction under 12 U.S.C. § 1441a(*l*) unless it is "specious and totally insubstantial" or "totally frivolous." The district court found that these Respondents' indemnity claim against RTC under 12 C.F.R. § 545.121 was not frivolous, and the court of appeals affirmed this finding. Pet. App. at 17-18. The Petition seeks review of this finding on several grounds, none of which merit the issuance of a writ.[5]

b. First, Petitioner contends that there are no assets to satisfy a judgment for these Respondents on their third party action against RTC. The court of appeals, however, explicitly distinguished its prior precedents on this issue, thus leaving Petitioner to argue, as it did unsuccessfully on rehearing below, that the Eighth Circuit disregarded its own precedent. Moreover, there was no factual record in the district court concerning whether a judgment on the third party action could be satisfied, thus the issue was not ripe for substantive review.

c. Second, Petitioner takes issue with the court of appeals' holding that the third party claim under 12 C.F.R. § 545.121 is not "frivolous." The court of appeals,

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[5] As a preliminary matter, it is not clear that this "frivolousness test" is properly applied in the context of a special removal statute such as that invoked by the RTC here. Under 12 U.S.C. § 1441a(*l*), RTC would seem to have the right to a federal court determination of the merits of the claim against it, whether frivolous or simply non-meritorious. The court of appeals elected not to reach this point. Pet. App. at 16 n.6. Significantly, the district court and the court of appeals distinguished the "frivolousness" analysis from full consideration of a motion to dismiss. Pet. App. at 18 n.8.

indicating that the issue did not require consideration at length, found that the claim could not be categorized as "'so patently without merit as to justify . . . the court's dismissal for want of jurisdiction.' " Pet. App. at 18 (quoting *Bell v. Hood*, 327 U.S. 678, 683 (1946)). This preliminary finding of the viability of a claim on an interlocutory appeal hardly merits this Court's attention.[6]

d. Third, Petitioner contends that the third party action did not state a cause of action because of this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991). Petitioner did not raise this point, however, in any court below, and thus it does not merit consideration here.

e. Fourth, Petitioner contends that there is no Article III "case or controversy" because a judgment in the third party action would not be collectible. This constitutional argument was not addressed by either of the courts below and is an offshoot of the point discussed at 4.b. above. Like the other issues raised by Petitioner, it requires a factual inquiry and was not developed in the prior proceedings. The issue does not justify an exercise of this Court's discretionary review.

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[6] Indeed, motions to dismiss on this very issue are now pending in the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF SHAWNEE COUNTY,
KANSAS DIVISION VII

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM Plaintiff, v. REIMER & KOGER ASSOCIATES, INC. et al., Defendants, FRANK MORGAN, et al., Defendants and Third-Party Plaintiffs, v. RESOLUTION TRUST CORPORATION, etc.	Case No. 91 CV 786 (Filed Oct. 9, 1992)

ORDER SEVERING MORGAN DEFENDANTS THIRD-PARTY PETITION AGAINST RESOLUTION TRUST CORPORATION

COMES NOW for consideration the motion of the plaintiff, Kansas Public Employees Retirement System, for an *ex parte* order severing the Morgan defendants third-party petition against the Resolution Trust Corporation.

The Court notes the recently filed Third-Party Petition by the Morgan defendants against the Resolution Trust Corporation (RTC) which seeks indemnification and/or contribution from RTC for the alleged negligence of RTC in managing the Home Savings Associations affairs since the association was placed in receivership in

March, 1991, and further seeks indemnification pursuant to the provisions of 12 C.F.R. § 545.121.

The Court also notes the Motion to Dismiss and Sever, filed by the plaintiff alleging that there is no nexus between the plaintiff's claim for damages, pursuant to fraud in the inducement of the KPERS investment in the former Home Savings Association, and the negligence and indemnification claims made by the Morgan defendants, as third-party plaintiffs, against RTC.

Without deciding the plaintiff's Motion to Dismiss, the Court hereby grants plaintiff's *ex parte* Motion for Severance, pursuant to the provisions of K.S.A. 60-221, and directs that the Clerk of the District Court assign Case No. 91 CV 786A to the third-party petition, filed by the Morgan defendants herein, against the Resolution Trust Corporation.

Counsel for the plaintiffs is hereby directed to notify all counsel of record, including the RTC, of this Order of Severance. Any party who claims to be aggrieved by this *ex parte* Order of Severance, may file a Motion for Reconsideration, which will be scheduled for immediate hearing, along with the plaintiff's Motion to Dismiss.

Entered this 8th day of October, 1992, at Topeka, Kansas.

/s/ Franklin R. Theis
Franklin R. Theis
District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY,
KANSAS DIVISION SEVEN

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, ---------- Plaintiff,	)	
vs	)	Case No.
REIMER & KOGER ASSOCIATES, INC.,	)	91 CV 786
vs	)	
---------- Defendants,	)	
vs	)	
FRANK MORGAN, et al., ---------- Defendants & Third-Party Plaintiffs,	)	
vs	)	
RESOLUTION TRUST CORPORATION, et al., ---------- Third-Party Defendants.	)	

HEARING

(Proceedings Had on October 8, 1992)

Before

THE HONORABLE FRANKLIN R. THEIS

JUDGE

APPEARANCES:

The Plaintiffs appeared by and through their counsel, Schroer, Rice, P.A., 115 East 7th Street, Topeka, Kansas, 66603, by Mr. Charles D. McAtee.

The Defendants appeared not.

THE COURT: This is the Kansas Public Employees Retirement System versus Reimer and Koger, Inc., et al., 91 CV 786, and you want to state your appearance?

MR. MCATEE: Charles McAtee on behalf of the plaintiffs, Kansas Public Employees Retirement System, Your Honor.

THE COURT: All right. At the conclusion of the hearing – we just had a hearing in the Corder versus Board of Healing Arts, and Mr. McAtee came in and – because the clerk's office is closed. No one is available to receive pleadings, filed with the Court as of 5:26, which the Court has noted on the filings, a Motion of Plaintiff, of Kansas Public Employees Retirement System to Strike the Third Party Petition Filed herein by Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I. I. Ozar, Raymond Gifford, Ralph E. Kiene, Randall M. Nay, Tony Salazar and Phillip Pistilli, or in the Alternative, to Sever the Claims as Set Forth in Such Parties' Third Party Petition from the Remaining Lawsuit of the Plaintiff. Additionally a copy of the, of the Third Party Complaint that was served on the, a copy which was served on the plaintiff has been provided to the Court, and there's also been provided to the Court an order requesting that the, that the third party claim alleged, alleged third party claim of the Morgan defendants that I just named against the Resolution Trust Corporation be severed, and I do this on a ex parte basis. I read the third party claim. The Court is familiar with the history of this case, feels that under the circumstances the addition of the Resolution Trust Corporation in another, by the third party petition would subject this case to removal under the federal statutes and in which case until the motion to dismiss would be argued,

testing the substance of that claim the Court would not feel that the, to maintain them in the same case and subjecting this case to removal would be in the best interest of the advancement of the principle case. And I would sign ex parte the order to sever and direct the plaintiff to notice the matter up for any hearing or objection that they might have, and schedule additionally the motion to dismiss and the Court would direct that this, that the third party claim be severed and it would be filed as a 91 CV 76A case as a separate case entirely from the previous 786 –

MR. MCATEE: 786A, I believe.

THE COURT: – 786, 91 – the original case is 91 CV 786 and the new case that would be created would be 91 CV 786A. And this order would be sent to the clerk, and it is entered today at – it would be now 5:42.

MR. MCATEE: Thank you, Your Honor. We will notice the motion to dismiss up promptly.

THE COURT: And I want you to notice them that the Court has entered a severance order and would be willing to, you know, for any – and the Court considers this matter on an emergency basis.

* * *